

Applicant:	<b>Bega Environmental Network</b>
File Ref:	<b>13-92</b>
Decision-maker:	<b>Annmaree Boake, Information and Privacy Officer</b>
Date of decision:	<b>9 January 2013</b>

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## 1. Summary of access application

On the 28 November 2012 NSW Trade & Investment received your valid access application under the *Government Information (Public Access) Act 2009 (GIPA Act)*, in which you sought access to the following:

- “1. All wood supply agreements / contracts between Forests NSW and South East Fibre Exports – to include both hardwood and softwood – from all RFA Regions
2. All wood supply agreements / contracts between Forests NSW and (a) Blueridge Hardwoods (b) the South coast Boral Sawmills (including the recently closed Batemans Bay mill)”

## 2. Processing of application

Under the *GIPA Act*, agencies must conduct reasonable searches for government information requested in an access application. In certain circumstances, they must also consult third persons to see whether they object to the information sought being released.

Searches for requested information were undertaken by Forests NSW within NSW Trade & Investment. All information located as a result of this search is listed in the attached schedule of documents.

Under s. 54 of the *GIPA Act* third party consultation was required and objections regarding the release of requested information have been received.

## 3. Decision to provide access

I am authorised by the principal officer, for the purposes of s. 9(3) of the *GIPA Act*, to decide your access application.

### 3.1 The Operation of the Government Information (Public Access) Act 2009

Under s. 9(1) of the *GIPA Act*, you have a legally enforceable right to be provided with access to the information sought, unless there is an overriding public interest against disclosure of the information.

Under s. 5 of the *GIPA Act*, there is a presumption in favour of the disclosure of government information to which you seek unless there is an overriding public interest against disclosure.

In making my decision, I am required to apply the public interest test under s. 13 of the *GIPA Act*, which provides that there will only be an overriding public interest against disclosure where public interest considerations in favour of disclosure are on balance, outweighed by those against disclosure.

The public interest test requires a three-step process:

- i. identifying public interest in favour of disclosure;
- ii. identifying public interest against disclosure; and
- iii. determining where the balance lies

### 3.2 Public Interest In favour of Disclosure

Provided by applicant

“1. There is a strong, ongoing public interest in this issue.”

2. The recent Administrative Decisions Tribunal Decision affirms the public right to access this information.”

Public Interest in favour of disclosure referred to in *Nature Conservation Council of NSW v Department of Trade and Investment, Regional Infrastructure and Services* [2012] NSWADT 195

There is a public interest in an agency dealing with public assets being accountable for the manner in which it contracts to sell those assets.

There is a public interest consideration favouring disclosure of information in order to further public policy development around the management of the publicly owned hardwood forest estate in NSW.

There is a public interest consideration favouring disclosure of information in order to encourage community engagement with government about sustainability.

### 3.3 Public Interest against Disclosure

s. 14(1)(d) There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency’s functions.

s. 14(1)(f) There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the effective exercise by an agency of the agency’s functions.

s. 14(1)(g) There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence.

s. 14(4)(a) There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market

s. 14(4)(c) There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to diminish the competitive commercial value of any information to any person.

s. 14(4)(d) There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any person’s legitimate business, commercial, professional or financial interests.

### 3.4 Decision on All Documents

In response to part 2 of your request for “All wood supply agreements / contracts between Forests NSW and (a) Blueridge Hardwoods (b) the South coast Boral Sawmills (including the recently closed Batemans Bay mill)” I have decided under s. 58(1)(c) of the *GIPA Act* that the information you seek is already publicly available and can be accessed from the following site <http://www.forests.nsw.gov.au/business/sales-and-supply>

In response to part 1 of your request for “All wood supply agreements / contracts between Forests NSW and South East Fibre Exports – to include both hardwood and softwood – from all RFA Regions” two documents have been located;

1. 17.3.2011 SEFE Wood Supply Agreement – Softwood (39 pages)
2. 5.3.1999 SEFE Wood Supply Agreement - Hardwood (48 pages)

Please note the third party has objected to the release of documents 1 and 2.

#### Document 1

There are public interest considerations both in favour of disclosure and against disclosure. The public interest considerations against disclosure are to be weighed against the public interest considerations in favour of disclosure.

- *There is a public interest in an agency dealing with public assets being accountable for the manner in which it contracts to sell those assets.*
- *There is a public interest consideration favouring disclosure of information in order to further public policy development around the management of the publicly owned hardwood forest estate in NSW.*
- *There is a public interest consideration favouring disclosure of information in order to encourage community engagement with government about sustainability.*

It is to be noted the ADT decision *Nature Conservation Council of NSW v Department of Trade and Investment, Regional Infrastructure and Services* [2012] NSWADT 195 was in relation to contracts regarding hardwood (native) forests; the applicant is seeking access to information regarding both softwood (plantation) forests and hardwood (native) forests.

Document 1 is a contract regarding softwood (plantation) forests.

Forests NSW softwood plantations operate under different environmental influence to native forests, which is that planted forests are a crop much like any other agricultural crop, and it is non-controversial in terms of environmental impact on communities, wildlife and native vegetation. Unlike native forests there is no public debate or contention on issues of sustainability in softwood plantations.

Softwood plantations have many different contracts with many customers, unlike the hardwood forests business where the wood supply contracts are almost identical, differing mostly in volume and species allocations and have for the most part been in the public arena for a number of years. Softwood contracts are subject to separate negotiations and no two softwood contracts are identical in form or substance.

I consider that there is a public interest in Forests NSW being transparent and accountable in dealing with public assets and the manner in which it contracts to sell those assets, this is the

## Notice of Decision (s. 58 of the GIPA Act)

only public interest consideration for release referred to above and applicable to document 1 that can be given any weight.

- *There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions*

Forests NSW has about 40 wood supply contracts with 25 separate customers. These are individually negotiated and each contains different terms and conditions, prices and specifications. Given the closed nature of the softwood log products market, information on market volumes, prices and price indexation is highly guarded by both buyer and seller and of significant commercial value. It is important to retain confidentiality as disclosure would have the effect of distorting the market pricing undermining the ability of Forests NSW perform its functions.

I consider the above to be a strong public interest against disclosure of document 1

- *There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the effective exercise by an agency of the agency's functions*

The Softwood Division of Forests NSW (Planted Forests) has a number of long term pulpwood supply agreements with a number of different customers. These agreements have price revision clauses which involve negotiation. The leverage within a negotiation is to a large degree in favour of the party possessing the accurate information. Providing the other party with information about competitor sales terms, conditions and pricing considerably weakens Forests NSW's negotiating position and therefore the ability to attain the best financial outcome for the taxpayers of NSW. The disclosure of this type of information therefore creates a very un-level playing field for the maximising of prices for Forests NSW. It follows therefore that disclosure of this information would not be to public good as it may result in a negative financial outcome for the taxpayers.

I consider the above to be a strong public interest against disclosure of document 1

- *There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence.*

Forests NSW competes with softwood plantation forest growers on a range of parameters including unit price, log quantity, log quality, contract term, payment terms and other commercial conditions of sale. The domestic and international log sales markets are closed markets with no individually disclosed or reported transactions or contract terms. There is also no common indicator of market price or volume in these markets and the transactions are infrequent with contract terms ranging from 1 to 50 years. To disclose the requested information would be disclosing information provided to NSW Forests in confidence.

I consider the above to be a strong public interest against disclosure of document 1

- *There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market*

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The disclosure of document 1 will undermine the open nature of the market based price escalation provisions that Forests NSW have established over the past forty years with the companies it sells log products to. The exchange of individual customer's actual selling price information is necessary for Forests NSW to establish the best possible commercial outcomes for the negotiations it has under the sales contract it has established. If released, other customers will be unwilling to share this information with Forests NSW in future and the market based price escalation provisions will need to be replaced with general indicators that are highly unlikely to achieve the same positive price outcomes as achieved through the operation of the current provisions. Rather than base price movements on actual outcomes achieved by Forests NSW in end product markets Forest NSW will be left negotiating movements blind of what is occurring in these markets as prices are not publicly available. Forests NSW would effectively be left to negotiate price movements on the hearsay of their customers.

I consider the above to be a strong public interest against disclosure of document 1

- *There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to diminish the competitive commercial value of any information to any person*

In offering long term parcels of pulplog to the market Forests NSW indirectly competes with other forest growers in Australia who are attempting to sell timber under agreements which support large scale and long term investment in competitive processing facilities to produce a range of timber products. To release this information without Forests NSW or third parties having access to other log buyers and sellers contract details would diminish the competitive commercial value of this information.

I consider the above to be a strong public interest against disclosure of document 1

- *There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any person's legitimate business, commercial, professional or financial interests*

Government agencies often receive detailed information about business operations that if disclosed to a competitor could undermine that business, the purpose of this clause is to protect those legitimate interests.

Due to fierce competition in the marketplace from pulpwood, third parties have negotiated commercial arrangements that best suit their operations with various plantation growers including Forest NSW. The disclosure of these arrangements to its competitors for the purchase of pulpwood will place it at a disadvantage by possibly being out bid for other supply arrangements with growers providing more information than normally available to growers placing buyers at more of a disadvantage in future contract negotiations. In addition international competitors' would use this information to undercut third parties selling price and prejudice their legitimate business interests.

I consider the above to be a strong public interest against disclosure of document 1.

In my view the public interest consideration in favour of disclosure is outweighed by those against disclosure.

I have decided in accordance with s. 58(1)(d) to refuse to provide access to document 1 because there is an overriding public interest against disclosure.

Document 2

There are public interest considerations both in favour of disclosure and against disclosure. The public interest considerations against disclosure are to be weighed against the public interest considerations in favour of disclosure.

- *There is a public interest in an agency dealing with public assets being accountable for the manner in which it contracts to sell those assets.*
- *There is a public interest consideration favouring disclosure of information in order to further public policy development around the management of the publicly owned hardwood forest estate in NSW.*
- *There is a public interest consideration favouring disclosure of information in order to encourage community engagement with government about sustainability.*

It is to be noted the ADT decision *Nature Conservation Council of NSW v Department of Trade and Investment, Regional Infrastructure and Services* [2012] NSWADT 195 was in relation to contracts regarding hardwood (native) forests; these contracts are now publicly available.

Document 2 is a contract regarding hardwood (native) forests.

The harvesting of native forests can have serious detrimental effects on the natural environment; disclosure of document 2 may result in scrutiny of the issue encouraging community engagement with government about sustainability.

The Department is accountable to Parliament, stakeholders, and the wider community in relation to a publicly owned natural resource and the manner in which it contracts to sell the assets. The disclosure of document 2 may assist in contributing to public policy development around the management of the publicly owned hardwood forests estate in NSW.

I consider the above three points to be strong public interests in favour of disclosure.

- *There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any person's legitimate business, commercial, professional or financial interests*

Release of any of this information will prejudice the legitimate business, commercial and financial interests of the third party. In the current economic climate, fully trade exposed businesses are faced with a high Australian dollar and intense international competition from fundamentally lower cost suppliers. To allow the release of confidential information to any direct or indirect competitor for resource, could in the current circumstances, force the third party to wind up Eden woodchip export business, at significant cost to Forests NSW and remote regional communities in south east NSW.

I consider the above to be a public interest against disclosure of document 2.

In accordance with s. 15(d) of the GIPA Act the fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account.

In my view the public interest consideration against disclosure is outweighed by those in favour of disclosure.

I have decided in accordance with s. 58(1)(a) of the *GIPA Act* to provide access to document 2 because there is an overriding public interest in favour of disclosure.

#### 4. Form of Access

Parties have **20 working days** from the date of this letter to apply for an internal review, and **40 working days** to apply for an external review. Whilst those review rights are pending, I am not permitted to provide you with access to document 2.

This decision is reviewable under s. 80 of the *GIPA Act* (see part 6 of this Notice for information about your review rights).

#### 5. Disclosure log

If information is released under a formal access application that would be of interest to other members of the public, an agency must record certain details about the application in its 'disclosure log' (under ss. 25 and 26 of the *GIPA Act*).

Please be advised that I have decided that this information could be of interest to other members of the public and certain details will be recorded in the disclosure log for the Department of Trade & Investment. Those details to be included are;

- Date application was decided,
- Description and amount of information provided,
- Details of how this information can be accessed.

This decision is reviewable under s. 80 of the *GIPA Act* (see part 6 of this Notice for information about your review rights).

#### 6. Your rights of review

If you are aggrieved by any of the reviewable decisions in this Notice of Decision, you may seek a review under Part 5 of the *GIPA Act*.

If you have any queries about this notice or require further information on your rights of review, please contact the Information and Privacy Officer 8289 3962 or by email at [annmaree.boake@industry.nsw.gov.au](mailto:annmaree.boake@industry.nsw.gov.au).



Annmaree Boake  
**Information and Privacy Officer**



## Schedule of Documents

Doc No.	Description of record	Format of Record Provided	Public interest(s) against disclosure / GIPA Act sections	Document Released Yes / No / Partial
1.	17.3.2011 SEFE Wood Supply Agreement – Softwood (39 pages)	Soft Copy	s.14(1)(d), s.14(1)(f), s.14(1)(g), s.14(4)(a), s.14(4)(c), s.14(4)(d)	No
2.	5.3.1999 SEFE Wood Supply Agreement - Hardwood (48 pages)	Soft Copy		Yes